Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
TELEPHONE COMPANY-CABLE TELEVISION CROSS-OWNERSHIP RULES, Sections 63.54-63.58	)	CC Docket No. 87-266
	)	
and	)	
	)	
Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	)	RM-8221

To: The Commission

PETITION FOR RECONSIDERATION

In this petition, Liberty Cable seeks reconsideration of that aspect of the Memorandum Opinion and Order which bars LECs from allocating "substantially all" of their analog channel capacity to a single programmer (i.e., an "anchor programmer") for use by all other VDT programmers desiring to use this capacity.[1/] While the Commission tentatively concluded in this order that properly structured channel sharing arrangements could offer significant public interest benefits, it barred LECs from requiring that video programmers share substantially all analog capacity on the theory that such arrangements would be "inconsistent with the common

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[1/] See Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58 ¶¶ 35, 274 (released November 7, 1994) (hereinafter "Memorandum Opinion" or "Further Notice," as appropriate).

carrier model for video dialtone and our requirement that LECs offer sufficient capacity to accommodate multiple video programmers.[2/] As shown below, however, allowing anchor programmers is not inconsistent with the common carrier model applicable to the provision of VDT service. And it is not inconsistent with the requirement that LECs offer sufficient capacity to accommodate multiple video programmers. Instead, it will promote competition and diversity in the video program market, and it will help ensure efficient investment in VDT infrastructure.

INTRODUCTION

In this proceeding, the Commission has consistently sought to advance three overarching goals for video dialtone service: (i) facilitating competition in the provision of video services; (ii) promoting an efficient investment in the national telecommunications infrastructure; and (iii) enhancing the diversity of video services to the American public.[3/]

To achieve these goals, the Commission has chosen to require all LECs offering VDT services to make available a common carrier platform which provides sufficient capacity to serve multiple video programmers.[4/] The agency has recognized, however, that due to "technical limits on the expandability of analog capacity and video

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[2/] See Memorandum Opinion ¶ 35.

[3/] See Memorandum Opinion ¶ 3; Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58 ¶ 1 (released August 14, 1992)("Second Report").

[4/] See Second Report ¶¶ 10-12.

dialtone systems,"[5] analog channel sharing is likely to be necessary to meet its objectives since many VDT customers undoubtedly will want to use analog channels to provide the same programming services to consumers.[6] Indeed, it now appears that while LECs intend over time to convert analog channels to digital, many VDT systems initially will provide between 70 and 80 analog channels. Consequently, the Commission tentatively concluded in the Memorandum Opinion and Order that LECs should be permitted to require programmer customers to share a limited amount of analog capacity, and it issued a Further Notice to obtain comments on what regulatory structure it should adopt to govern such channel sharing.[7] Unfortunately, while recognizing the desirability of channel sharing at least on a limited basis, the Commission barred LECs from requiring sharing of substantially all analog channels.

Liberty filed comments in response to the Further Notice suggesting specific regulations that the FCC should adopt to govern channel sharing, and we will not repeat those comments here.[8] However, rather than apply these channel sharing rules to the sort

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[5] Further Notice ¶ 268.

[6] See id. ¶ 274 ("[Channel sharing] arrangements could increase the number of video programmers on the platform, thus creating diverse programming options. In addition, they would enable multiple video programmers to offer full service packages to consumers. Channel sharing arrangements would also maximize use of the platform by programmer-customers, thereby benefitting video dialtone providers.").

[7] See id. ¶¶ 274-75.

[8] See Comments of Liberty Cable Company, filed Dec. 16, 1994.

of limited channel sharing which the Commission has proposed, the agency instead should permit sharing of substantially all channels, and it should apply whatever channel sharing rules it adopts in response to the Further Notice.

I. By Allowing Anchor Programmers, the Commission Will Facilitate Competition and Diversity in the Multi-Channel Video Programming Market and will Promote Efficient Use of VDT Infrastructure

A. In Order to Compete Effectively with Cable, VDT Programmers Must Offer More than 60 Channels of Programming

To compete effectively with cable television operators, video programmers using a VDT platform must be able to offer consumers a programming service of at least the 65 to 70 channels that cable systems presently offer in most major markets, and they must be able to do so at a price which is comparable to the roughly $25 monthly fee that cable operators charge for a comparable amount of programming. As we show below, one way for this to occur in the short term is through analog channel sharing arrangements under which LECs are permitted to require all of their programmer customers to share up to 60 analog channels.

The Commission's own findings in analogous situations are evidence that a VDT programmer customer will be unable to compete effectively with the cable system serving its area unless it offers a programming package of at least 60 channels. For example, the Commission concluded three years ago that MMDS operators could not compete effectively with cable unless the agency substantially increased the MMDS operators' authorized channel capacity. As a

result, it increased MMDS channel capacity to 33 channels.[9/] Yet the Commission found just four months ago that MMDS still is at a competitive disadvantage to cable since many cable operators provide 60 channels of programming or more. The Commission felt, however, that this problem would be alleviated shortly since MMDS operators can increase channel capacity through digitization at a substantially lower cost per subscriber than wire-based systems like cable and VDT.[10/]

Similarly, the Commission has noted that DBS operators are spending tens of millions of dollars to rapidly expand DBS channel capacity in order to compete effectively with cable. For example, the agency noted that DirectTV planned to increase its channel capacity to 216 channels in late 1994 after beginning service a few months earlier with more than 50 channels of programming.[11/] Similarly, it noted that Primestar presently offers 71 video channels and intends to expand capacity to more than 150 channels next year.[12/]

[9/] See Second Report and Order in Dkt. No. 90-54, FCC Rcd. 6792 (1991).

[10/] See Annual Assessment of the Status of Competition in the Market for the Delivery for Video Programming, First Report ¶¶ 85, 90 (CS Dkt. No. 94-48, released Sept. 28, 1994). See also Notice of Prop. Rulemaking in MM Dkt. No. 94-131 ¶ 2 (released Dec. 1, 1994)("accumulating sufficient channel capacity remains a major obstacle to many . . . [MMDS] operators . . . . [However,] the use of digital compression should help to alleviate this problem in the future")(citation omitted).

[11/] Id. ¶ 63.

[12/] Id. ¶ 68.

The Commission likewise has recognized that one reason the so-called backyard satellite dish industry has more subscribers than any other would-be cable competitor today is because it offers customers more channels of programming than do cable operators:

> ("The [backyard satellite dish] industry's primary competitive strength vis-a-vis cable is programming variety and flexibility . . . . [T]he most common reason for purchasing . . . [a backyard satellite dish is] to gain access to an increased variety of programming)."[13/]

The cable industry's own actions constitute additional evidence that consumers will demand 60 or more channels of programming from multi-channel programmers who use VDT systems to distribute their programming. While cable systems a few years ago often required consumers desiring 60 channels to subscribe on an a la carte basis to at least half of these channels, many cable operators today offer 50 or more channels to all subscribers as part of their basic tier of service.[14/]

B. Consumers Will Demand that All VDT Programmers Fill a Very Large Portion of Their 65-70 Channels With the Same Programming

Not only must a VDT programmer customer offer consumers more than 60 channels of programming in order to compete effectively with cable, consumers also will demand in the short term that most of these channels be filled with programming that already has proven to be highly popular. For example, consumers plainly will

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[13/] Id. ¶ 75.

[14/] Although some cable operators do provide customers the option of a basic broadcast tier containing fewer than 20 channels, only a small percentage of subscribers express interest in such offerings.

insist that the vast majority of VDT programmer customers carry the five to eight most popular local television broadcast stations. Consumers likewise almost certainly will demand that VDT programmer customers make available to them the 16 basic cable networks that already have proven to be so popular that they are provided by cable systems to more than 90 percent of all cable homes. These 16 basic cable channels are listed in Attachment 1. In addition, a very large percentage of VDT programmer customers will want to carry the eight to 10 basic cable programming services whose existing nationwide cable penetration is between 50-90 percent of all cable households. Further, most VDT programmer customers almost certainly will want to carry the three to five pay cable services that have proven most popular, such as HBO, Cinemax, the Disney Channel, the Movie Channel, and Show Time.

Although a VDT programmer customer theoretically could obtain the 65-70 channels it needs to compete effectively with cable by obtaining some analog capacity and some digital capacity, doing so will not be economically feasible. This is demonstrated clearly by the comments of several parties in response to the Further Notice seeking suggestions on a regulatory structure to implement the limited channel sharing that the Commission envisions. Some commenters stated that digital technology will not be sufficiently prevalent to be considered an analog alternative for up to 20 years.[15/] Even GTE has reconsidered its original proposal, and is

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[15/] See, e.g., Comments of Ortel Corporation at 3 ("the current base of installed TVs and VCRs with analog-only tuners will (continued...)

now planning a platform less dependant on digital technology. GTE explained its decision by noting that "widespread use of set top boxes with digital capabilities in the initial phases of GTE's video dialtone deployment is not economically feasible."[16/]

It will be uneconomical in the short term for programmer customers to rely on digital VDT channel capacity for any of the 65-70 channels they need to provide since consumers will have to pay for set-top converters to receive digital signals, and these convertors will be very expensive for at least several more years.[17/] The cost of converters used in field trials today is approximately $1,000 each.[18/] Moreover, it appears that the cost of converters will be several hundred dollars for at least several more years.[19/]

[15/](...continued)
be predominant in the U.S. for the next 10 to 20 years"); Comments of the Pacific Telesis Group at 4 (noting that it may be as many as 15 or 20 years before digital services become sufficiently dominant to permit discontinuance of analog transport).

[16/] Comments of GTE at 4.

[17/] See Comments of the Consumer Electronics Group of the Electronic Industries Association at 2.

[18/] See, e.g., Comments of Ortel Corporation at 3 (converter cost is more than $1000); Comments of the United and Central Telephone Companies at 5 (current converter price is between $1000 and $2000); Comments of U.S. West at 16 (estimating that current prices begin in the $500-$700 range).

[19/] Comments of NYNEX at 7 (predicting that converters will cost approximately $350-$450 over the next couple of years); Comments of Southwestern Bell at 3 n.6 (noting that the Commission's estimate of $300 per converter was improperly based on Southwestern Bell's "most optimistic ... projected set-top prices expected by the year 2000."

In addition to the high cost of set-top converters, several undesirable features associated with their use have produced widespread consumer aversion to converters.[20/] Negative side effects of converter use include: (i) many features that are built into television receivers and VCRs either cannot interoperate with set-top converters or are disabled by set-top converters; (ii) consumers must bear the cost of renting set-top converters, which duplicate many of the functions of their television receivers; and (iii) consumers have been forced to obtain and use multiple remote control units.[21/]

Even if video programmer customers could compete effectively with cable by using a combination of analog and digital channels to provide their 65-70 channel service, barring the use of anchor programmers still would require inefficient use of VDT infrastructure. This is because LECs would be forced to expand their VDT networks simply to provide a sufficient amount of capacity to permit VDT customers to carry a substantial number of identical channels of programming.

II. Permitting Anchor Programmers and Requiring Them to Share Channel Capacity on a Common Carrier Platform Will Promote Each of the Commission's Regulatory Objectives

To advance its three objectives for VDT most effectively, the Commission should permit anchor programmers but require them to share their channels with all programmer customers who desire

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[20/] See Comments of the Consumer Electronics Group of the Electronic Industries Association at 6.

[21/] Id. at 4.

access to them under the regulations proposed by Liberty in its comments responding to the Further Notice.[22/] First, by allowing an anchor programmer, the Commission would increase the number of VDT programmer customers who could provide the large number of channels of programming necessary to compete effectively with cable. Indeed, if LECs are permitted to allocate up to 60 analog channels for shared use to a single anchor programmer, as many as 20 different programmers conceivably could provide consumers with a full service, 60 channel package.[23/] By contrast, given an 80 channel VDT platform, the limited channel sharing envisioned by the Commission would permit just one competitor at most. For example, if 15 channels were set aside for shared use, just 65 channels would remain available for individual lease. A programmer would have to lease 45 individual channels and 15 shared channels to obtain a 60 channel package. Moreover, it is not clear that the Commission policy would permit even one programmer customer to obtain 45 unshared analog channels from an 80 channel system

Anchor programming would foster a diversity of information sources as well. Smaller video programmers--those not choosing to offer a 65-70 channel package-- would benefit from anchor programming because they require the foundation of an anchor

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[22/] See supra note 8.

[23/] If 60 channels were set aside for shared use, 20 channels would remain available for individual lease. Conceivably, 20 different programmers could lease and program a single individual channel, which, when combined with 59 or 60 shared channels, would permit each programmer to offer consumers a unique full service package.

programmer to expand their market penetration in an economically viable manner.

To the extent that channel capacity is limited on VDT platforms, reserving a large number of channels for shared use also is the most efficient method of allocating that capacity. From this it follows that anchor programming would be the most effective way for the Commission to "promote an efficient investment in the national telecommunications infrastructure."

Finally, allowing anchor programmers also would be wholly consistent with the common carrier model that the Commission desires for governing VDT. Thus, Liberty demonstrated in its comments in response to the Further Notice that channel sharing arrangements are consistent with both Section 202(a) and Section 613(b) of the Communications Act (47 U.S.C. §§ 202(a) and 533(b), respectively). It need not repeat that argument here.

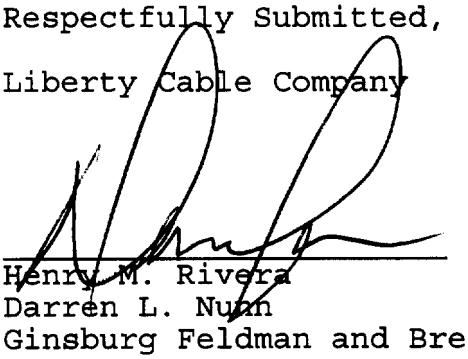
CONCLUSION

Liberty urges the Commission to reconsider its Memorandum Opinion and Order and permit LECs to require that video programmer customers share up to 60 analog channels. Such channel sharing is

necessary to ensure that VDT programmer customers have an opportunity to compete effectively with cable. It also is necessary to ensure program diversity and to promote efficient investment in VDT infrastructure.

Respectfully Submitted,

Liberty Cable Company

By: 

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SUMMARY

The Commission has stated that its primary objectives in establishing a regulatory structure to govern video dialtone service are to facilitate competition, to promote efficient investment, and to enhance the diversity of video services to the American public. To achieve these objectives, the Commission now recognizes that some form of channel sharing may be required. While Liberty is encouraged by the Commission's interest in channel sharing, it fears that the ban on anchor programmers will unintentionally thwart the Commission's plan for video dialtone service.

As demonstrated herein, the Commission can accomplish its stated objective by permitting LECs to allocate approximately 60 shared analog channels to a single anchor programmer, and require the anchor programmer to share its channels with all programmer-customers who desire access to them.

Attachment 1

BASIC CABLE SERVICE	NUMBER OF SUBSCRIBING HOUSEHOLDS (In Millions)
A&E	61
C-SPAN	59.6
CNN	61.7
The Discovery Channel	59.3
ESPN	61.9
Family Channel	57.4
Headline News	52.3
Lifetime	57
MTV	56.5
Nickelodeon	59
TBS	60.9
TBS Superstation	60.2
TNN	57.5
TNT	59.9
USA	60.1
The Weather Channel	53.4

Source: Broadcasting & Cable Yearbook 1994, Sec. G.